

1501651 (Migration) [2016] AATA 3178 (2 February 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Carly Louise Bernardis

CASE NUMBER: 1501651

DIBP REFERENCE(S): BCC2014/507709

MEMBER: Denise Connolly

DATE: 2 February 2016

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A.

Statement made on 02 February 2016 at 8:33am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 16 January 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 20 February 2014 on the basis of her relationship with her sponsor, Mr Christopher Bernardis, to whom she is now married. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied she was in a genuine and continuing de facto relationship with her sponsor and accordingly found the applicant was not the de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 1 February 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Bernardis. The sponsor's mother and sister also attended the hearing in support of the parties. The Tribunal was of the view it was not necessary to take their oral evidence as they have both provided written statements.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether, at the time of application, the applicant was the de facto partner of her sponsor. If the Tribunal is satisfied this requirement is met, it will also consider whether the applicant continues to meet the criteria at the time of decision.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, at the time of application, the applicant claimed to be the de facto partner of the sponsor who is an Australia citizen. He provided to the Department a copy of his Australian passport issued 13 November 2007. He was born in 1987.
8. The applicant claims to have been in a de facto relationship with the sponsor since January 2012. The parties have since legally married on 2 January 2015 in NSW and have provided a copy of their Certificate of Marriage.
9. At the time of the visa application the parties asserted that they first met in the workplace in April 2011 and commenced their de facto relationship on 6 February 2013. They provided evidence of a joint bank account and claimed that the sponsor had been financially supporting the applicant while she was studying. They explained that they resided in a property jointly owned by the sponsor and his father so the water and council rate notices

are not in the applicant's name. They asserted that they share household duties. They travelled together to the UK to attend a wedding together in January 2013 and provided evidence of this. The sponsor met the applicant's family and friends during this trip. They go to the gym and attend family functions, parties and celebrations together. In January 2014 the parties decided to marry in late 2014/early 2015, which they did on 2 January 2015. The wedding was delayed so that the applicant's family could travel to Australia to attend.

10. The parties travelled to the UK together in early 2013 and have lived together since returning to Australia. On their return to Australia the applicant commenced studying and the sponsor has financially supported her since that time. She works with him on a part-time basis in his family restaurant.
11. The parties provided evidence of a joint bank account opened in April 2013. They provided evidence of their travel together in January 2013. There is a utility bill in both names dated February 2014. They provided several photographs. They also provided statements of support from the sponsor's mother and a friend attesting to the genuineness of their relationship, and evidence of their planned wedding reception.
12. The delegate was not satisfied there was sufficient evidence to demonstrate that, at the time of application, the parties had lived in a de facto relationship for 12 months or that the parties saw the relationship as a long term one. She decided there was insufficient evidence of a genuine and continuing de facto relationship.
13. Prior to the hearing the applicant sent to the Tribunal the following:
 - a. A statement regarding the development of the relationship and explaining the relevance of the various documents provided
 - b. Documentary evidence confirming the parties married on 2 January 2015
 - c. Photographic evidence that the reception was attended by numerous guests including the applicant's family from the UK
 - d. Over 100 photographs of the parties together, taken since 2012, many of which appear to have been taken in social settings
 - e. Evidence of household purchases made in 2013 and 2014 for household items and furniture
 - f. Annotated bank statements from October 2012 indicating purchases made while the parties were together, including transfers made from the sponsor's account to that of the applicant in May 2013
 - g. The applicant's confirmation of enrolment in the Master of Forensic Accounting commencing March 2013 and evidence that the sponsor paid fees for the course
 - h. A statement from the sponsor's sister attesting to the genuineness of the relationship. She explained that the parties lived with her in Potts Point from January 2012 until April 2012 when they moved in with the sponsor's parents in Wollongong.
 - i. Three other statements from friends who have known the parties for 4 years and consider their relationship in that time to be committed and ongoing.
14. At the hearing the applicant gave persuasive evidence that she and the sponsor have been living together since January 2012. They started their relationship at the end of 2011 and moved in as a couple with the sponsor's sister in Potts Point in January 2012. In about April 2012 they moved to Wollongong and lived with the sponsor's parents until they travelled together to the UK in January 2013. They then moved to their own place when they returned

to Australia, the sponsor's deceased grandmother's home which he owned with his father. The applicant indicated that she had thought 'to the exclusion of all others' meant that the Department wanted to know when she and the sponsor started living together alone. She thought the fact that they were living with her sister-in-law and her parents-in-law meant they were not living 'to the exclusion of all others'.

15. The applicant described the financial arrangements since January 2012. They have been sharing the cost of bills and groceries. She provided evidence that the sponsor paid the first instalment for her Masters on 14 January 2013, when he paid \$11,500 towards her study. From April 2012 she worked in the family restaurant as a contribution to his business. Since January 2012 they have presented themselves to family and friends as a committed couple. The sponsor met her parents when they visited Australia in March 2012 when they presented themselves as a de facto couple. Her parents knew the parties were living together at the time.
16. The applicant also showed the Tribunal documents relating to the purchase of a vehicle in March 2013 and the insurance document dated April 2013 confirming that she was the other driver of the vehicle.
17. At the hearing the applicant showed the Tribunal numerous cards exchanged between the parties since January 2012 and cards received by the parties from family and friends indicating that the parties presented themselves as a committed couple.
18. The applicant also explained that she and the sponsor were good friends before commencing their intimate relationship and that the sponsor had been supportive of her during the demise of her difficult relationship with her ex-partner. She realised that her previous relationship was not good, in part because of the emotional bond she was developing with the sponsor. He provided her with strong emotional support at that time and continues to do so.
19. The Tribunal also spoke to the sponsor. His evidence was consistent with that of the applicant. The Tribunal considered the sponsor to be an honest and reliable witness.

WERE THE PARTIES IN A DE FACTO RELATIONSHIP AT THE TIME OF APPLICATION?

20. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
21. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
22. The Tribunal finds the parties are credible witnesses and it accepts the information contained in the documentation and their oral evidence that they met in April 2011 when they worked together and formed an intimate relationship late in 2011 when the applicant broke up with her ex-partner. It accepts that they commenced living together as a de facto couple in January 2012 when they lived with the sponsor's sister in Potts Point. It also accepts they moved in with the sponsor's parents in Wollongong in April 2012. While the applicant had stated in the visa application that their de facto relationship commenced in January 2013, the Tribunal accepts her explanation that she thought 'to the exclusion of all others' meant that

she could not put down the date when they started living together in Potts Point with the sponsor's sister.

23. Following the application for review the applicant has provided to the Tribunal several statements, photographs, evidence that the sponsor paid for her study in January 2013, bank statements showing the purchase of household items in late 2012 and 2013, evidence that the applicant was included in the sponsor's vehicle insurance in 2013 and other miscellaneous material.
24. Based on the additional material in combination with the parties' oral evidence, the Tribunal is satisfied that both at the time of the visa application and the time of decision, the parties have been pooling financial resources, were cohabitating, undertook social activities together and provided each other with companionship and emotional support. The Tribunal is satisfied they commenced living in a de facto relationship in January 2012. The Tribunal is satisfied that at the time of the visa application and time of decision the parties had a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and lived together. The Tribunal is satisfied that their family and friends consider their relationship to be genuine and ongoing. This has been further demonstrated by their legal marriage in January 2015 celebrated by numerous family members and friends. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application.
25. This means the applicant meets cl.820.211(2)(a). The sponsor was born in 1987. The applicant was holding a Student visa at the time of application. The applicant also meets the remaining time of application criteria in cl.820.211(2)(c) and (d) (the sponsorship and Schedule 3 criteria).
26. The Tribunal is satisfied that the parties, who are now legally married, continue to have a mutual commitment to a shared life to the exclusion of all others, and that the relationship is genuine and continuing, and that the couple live together. The Tribunal is satisfied the applicant is now the sponsor's legal spouse. It is satisfied cl.820.221 is met.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

27. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
28. Both parties are over 18 years of age.
29. While there is ample documentary evidence about the current state of the relationship there is limited documentary evidence concerning the nature of the relationship in the 12 months before the visa application. However there are persuasive statements from the parties (both of whom the Tribunal considers to be credible witnesses), family members and friends attesting to the relationship and its duration. In these circumstances the Tribunal accepts that the de facto relationship was in existence for at least 12 months before the visa application.
30. The Tribunal is satisfied the applicant meets the additional criteria prescribed in r.2.03A.

31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

32. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A.

Denise Connolly
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).